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No. 91-1757

In The

Supreme Court of the United States

October Term, 1991

TIMOTHY DALE BUNCH,

Petitioner,

v.

CHARLES E. THOMPSON, WARDEN
MECKLENBURG CORRECTIONAL CENTER,

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court Of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. WHETHER BUNCH'S CLAIM BASED ON *EDWARDS V. ARIZONA* IS FORECLOSED BY THE NEW RULE DOCTRINE BECAUSE IT IS BASED ON AN INTERPRETATION OF *EDWARDS* WHICH WAS NOT DICTATED BY CONTROLLING PRECEDENT WHEN BUNCH'S CONVICTION BECAME FINAL.

2. WHETHER BUNCH'S *EDWARDS* CLAIM IS BARRED BY THE NEW RULE DOCTRINE BECAUSE IT WOULD REQUIRE THE ANNOUNCEMENT IN THIS CASE OF A NEW RULE CONCERNING THE MEANING OF "INITIATION OF INTERROGATION."

3. WHETHER THE EXCLUSIONARY RULE SHOULD BE APPLIED IN FEDERAL HABEAS REVIEW OF *EDWARDS* AND *MIRANDA* CLAIMS FROM STATE CRIMINAL CONVICTIONS.

4. WHETHER THE POLICE IMPERMISSIBLY INITIATED INTERROGATION OF BUNCH.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 6

ARGUMENT 7

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Roberson, 486 U.S. 675 (1988) 18

Bunch v. Commonwealth, 225 Va. 423, 304 S.E.2d 271 (1983), *cert. denied*, 464 U.S. 1064 (1984).. 5, 8, 18, 19

Bunch v. Thompson, 949 F.2d 1354, 1360 (4th Cir. 1991).....5, 7

Butler v. McKellar, 495 U.S. 915 (1990)..... 7

Cabana v. Bullock, 474 U.S. 376 (1986) 20

Castillo v. State, 742 S.W.2d 1 (Tex.Cr.App. 1987)..... 11

Connecticut v. Barrett, 479 U.S. 523 (1987).....11, 20

Cox v. State, 493 N.E.2d 151 (Ind. 1986) 11

Day v. State, 816 S.W.2d 852 (Ark. 1991)..... 12

Duckworth v. Eagan, 492 U.S. 195 (1989) 14, 15, 16

Eaton v. Commonwealth, 240 Va. 236, 397 S.E.2d 385 (1990), *cert. denied*, 112 S.Ct. 88 (1991) 11

Edwards v. Arizona, 451 U.S. 477 (1981)..... *Passim*

Estelle v. Smith, 451 U.S. 454 (1981) 8

Foster v. Commonwealth, 8 Va. App. 167, 380 S.E.2d 12 (1989)..... 12

Griffin v. Lynaugh, 823 F.2d 856 (5th Cir. 1987)....17, 20

Grooms v. Keeney, 826 F.2d 883 (9th Cir. 1987) 12, 18

Holland v. State, 587 So.2d 848 (Miss. 1991)..... 12

Johnson v. State, 303 So.2d 7 (Ga. 1983)..... 12

TABLE OF AUTHORITIES – Continued

Page

Johnson v. Zerbst, 304 U.S. 458 (1938) 7, 8, 9

Kaufmann v. United States, 394 U.S. 217 (1969) 15

King v. State, 436 So.2d 50 (Fla. 1983) 12

Maglio v. Jago, 580 F.2d 202 (6th Cir. 1978) 11

McCall v. State, 501 So.2d 496 (Ala.Cr.App. 1986) 12

Minnick v. Mississippi, 111 S.Ct. 486 (1990) 13, 21

Miranda v. Arizona, 384 U.S. 436 (1966) ..... *Passim*

Moulds v. State, 429 So.2d 1176 (Ala.Cr.App. 1983) 12

Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979) 12

Oregon v. Bradshaw, 462 U.S 1044 (1983) 8, 9, 17

Owen v. State, 560 So.2d 207 (Fla. 1990) 12

People v. Evans, 530 N.E.2d 1360 (Ill. 1988) 11

Plazinich v. Lynaugh, 843 F.2d 836 (5th Cir. 1988) 17

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 16

Smith v. Illinois, 469 U.S. 91 (1984) 11

Solem v. Stumes, 465 U.S. 638 (1984) 9

State v. Acquin, 448 A.2d 163 (Conn. 1982) 12

State v. Anderson, 553 A.2d 589 (Conn. 1989) 12

State v. Johnson, 318 N.W.2d 417 (Io. 1982) 11

State v. Robinson, 427 N.W.2d 217 (Minn. 1988) 12

State v. Scott, 626 S.W.2d 25 (Tenn.Cr.App. 1981) 12

State v. Sundstrom, 552 A.2d 81 (N.H. 1988) 12

TABLE OF AUTHORITIES – Continued

Page

Stringer v. Black, 112 S.Ct. 1130 (1992)..... 11

Stone v. Powell, 428 U.S. 465 (1976)..... 14, 15, 16

Sumner v. Mata, 449 U.S. at 545..... 20

Teague v. Lane, 489 U.S. 288 (1989) 7, 11, 16, 17

Towne v. Dugger, 899 F.2d 1104 (11th Cir. 1990)..... 11

United States ex rel Espinoza v. Fairman, 813 F.2d 177 (7th Cir. 1987)..... 11

United States v. Cherry, 783 F.2d 1124 (5th Cir. 1984)..... 19

United States v. Duggan, 936 F.2d 181 (5th Cir. 1991)..... 17

United States v. Gotay, 844 F.2d 971 (2nd Cir. 1988) 12

United States v. Porter, 776 F.2d 370 (1st Cir. 1985) 12

United States v. Riggs, 537 F.2d 1219 (4th Cir. 1976) .12, 20

United States v. Wyatt, 561 F.2d 1388 (4th Cir. 1977) 20

Wainwright v. Goode, 464 U.S. 78 (1983)..... 20

Wainwright v. Sykes, 433 U.S. 72 (1977) 14

Witherow v. Williams, 112 S. Ct. ___, 51 Cr.L. 3021 (1992) 14

Wyrick v. Fields, 459 U.S. 42 (1982)..... 8, 9, 10

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The respondent agrees with Bunch's statement of the course of proceedings, but adds the following statement of the facts, as found by the Supreme Court of Virginia, relevant to the issues presented for review.

> The record shows that in the months of December, 1981, and January and February, 1982, Bunch, a sergeant in the United States Marine Corps, was detached from duty in Japan and assigned to temporary duty at Quantico in Prince William County. During this period, he met Su Cha Thomas, a divorced woman living

alone in Dale City near Quantico, and an intimate relationship developed between them. At the time, Bunch was separated from his wife.

On February 2, after Thomas had failed to report for work, Prince William County police went to her home and found her body hanging from a door knob by a scarf tied around her neck. An autopsy revealed a gunshot wound to the head and "congestion of the blood [vessels] within the lungs." The medical examiner concluded "this was a combined cause of death due to a gunshot wound to the head . . . with a secondary complication, asphyxiation by hanging."

One of the items missing from Thomas's home was a lady's Rolex wristwatch. On the day Thomas's body was discovered, Bunch sold a similar watch to an Arlington County pawn shop. A report filed by the pawn shop with the police, as well as other information, led investigators to Bunch, who had returned to his permanent duty station in Japan.

Bunch was interrogated in Japan on February 16 by Donald L. Cahill, a Prince William County police investigator who had journeyed to Japan with warrants charging Bunch with the robbery and murder of Thomas. In the course of the interrogation, Bunch made certain incriminating statements to Cahill. Bunch was returned to the United States, and upon his arrival in Prince William County on February 21, made a statement to Cahill admitting he had killed Thomas on January 31 and had taken her Rolex watch, a diamond ring, a string of pearls, and other items of jewelry. Bunch stated he killed Thomas because "she was a slut and she

reminded him too much of his wife and he wanted her money."

In a pretrial motion, Bunch sought to suppress the confession he made to Investigator Cahill on February 21, following his return to Prince William County from Japan. In the motion, Bunch claimed that he gave the confession after his earlier "requests for counsel had been unfulfilled." Finding that Bunch had requested and been denied the assistance of counsel in Japan, the trial court suppressed the incriminating statements made there by Bunch. The court refused, however, to suppress the confession Bunch gave to Investigator Cahill on February 21 in Prince William County.

The record shows that Investigator Cahill was accompanied to Japan by William Hamblen, an assistant Commonwealth's attorney for Prince William County. Upon their arrival at Bunch's duty station at Iwakuni, Bunch was brought to Naval Intelligence Service Headquarters by military police. He was placed in a room with Cahill and Hamblen, and Cahill read him his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Bunch signed a "Warning and Consent" form and indicated he was willing to talk. Cahill then began to interrogate him.

According to Bunch's testimony at the suppression hearing, he asked to consult counsel "approximately a dozen times" during the interrogation at Iwakuni. Cahill and Hamblen denied Bunch made any outright request for counsel, but claimed he stated once, after the interrogation had continued for some time, that "he felt like he might want to talk to a lawyer." When this statement was made, Hamblen left the room

and Cahill talked to Bunch on another matter an additional several minutes. Then, as Cahill was leaving the room to ask Hamblen whether the interrogation should continue in light of Bunch's statement concerning counsel, Bunch stated he would cooperate. He told Cahill that "the gun" was at his mother's home in Indiana and that "the ring" was in Japan.

Cahill and Hamblen decided Bunch should not be interrogated further unless he signed another "Warning and Consent" form. When a new form was presented to him, Bunch refused to sign it, and the interview was terminated.

In the custody of military personnel, Bunch was transported by plane from Japan to Dulles Airport in northern Virginia and by automobile from Dulles to Quantico, the trip consuming some forty-two hours. Although he was not questioned during the trip about Thomas's murder, military personnel escorting Bunch advised him of his *Miranda* rights on the flight from Los Angeles to Dulles. Upon arrival in Quantico after midnight on February 21, Bunch was processed for delivery to Prince William County authorities.

As a part of this process, Bunch consulted with Major Donald R. Jillisky, a lawyer attached to the Marine Judge Advocate General's Office. The major told Bunch that he was "a Marine Corps lawyer . . . not his lawyer" and that it was his, the major's purpose "to inform [Bunch] of what his situation was and to surrender him to State authorities." Jillisky informed Bunch of the charges against him and told him he would be required to hire his own lawyer or secure court-appointed counsel. Jillisky advised Bunch that

"he did not have to say anything until he consulted with his lawyer, and that it was probably not in his best interest to say anything until he consulted with his lawyer."

At the conclusion of the processing at Quantico, Bunch was turned over to Investigator Cahill, who transported him to a Prince William County police substation. En route, Cahill asked Bunch "if he felt he was ready to sit down and go over the case." Cahill told Bunch that "[i]t was entirely up to him" and that "he certainly was not required to talk to [Cahill] if he didn't want to." Bunch stated that he had talked to the lawyer at Quantico and had been advised "not to say anything" and to talk to a civilian lawyer before talking to the police. Bunch added, however, that he had decided "he was ready to tell the whole story" and that "he wanted to get it off his chest."

At the substation, Bunch was advised of his *Miranda* rights, and he executed a "Warning and Consent" form. He then proceeded to give Cahill the confession that is now in controversy.

At the conclusion of the suppression hearing, the trial court ruled that Bunch had "intelligently, wittingly, freely and voluntarily . . . waived [his Miranda] rights" before he gave Cahill his confession. Accordingly, the court held that the confession was admissible into evidence.

Bunch v. Commonwealth, 225 Va. 423, 429-432, 304 S.E.2d 271, 274-275 (1983), *cert. denied*, 464 U.S. 1064 (1984).

SUMMARY OF ARGUMENT

This case involves a straightforward application of the new rule doctrine, and is not worthy of review on certiorari. The 1983 decision of the Supreme Court of Virginia to uphold the admission of Bunch's confession to the police was a reasonable, good-faith interpretation of *Edwards v. Arizona* and other federal precedent existing at the time. It was not clear at that time that *Edwards* had established a *per se* rule that reinitiation of communications with the police by a suspect in custody who has invoked his right to counsel was a *sine-qua-non* to a finding that his subsequent confession, albeit knowing, intelligent, and voluntary, is admissible. Moreover, controlling precedent did not dictate in 1983, *and does not dictate even today*, a finding that interrogation was impermissibly reinitiated by the police in Bunch's case.

Even were Bunch's *Edwards* claim not barred by the new rule doctrine, certiorari review would not be necessary, because claims under *Edwards* and *Miranda v. Arizona* arising from state criminal prosecutions should generally not be reviewed in federal habeas corpus.

In any event, certiorari review is not warranted, because Bunch's *Edwards* claim must be rejected on the merits.

ARGUMENT

I. THIS CASE INVOLVES A STRAIGHTFORWARD APPLICATION OF THE NEW RULE DOCTRINE, AND IS NOT WORTHY OF CERTIORARI REVIEW.

Bunch's interpretation of *Edwards v. Arizona*, 451 U.S. 477 (1981), was not dictated by controlling case law at the time his conviction became final, and should not be applied retroactively to his case. *See Teague v. Lane*, 489 U.S. 288 (1989); *Butler v. McKellar*, 495 U.S. 915 (1990).

This Court's opinion in *Edwards* left substantial uncertainty in the lower courts concerning at least two issues. The first was whether reinitiation of communications with the police by a suspect in custody who has invoked his right to counsel was a *sine-qua-non* to a finding that his subsequent confession, albeit knowing, intelligent, and voluntary, is admissible, or merely a factor to be weighed in applying the traditional voluntary waiver test established in *Johnson v. Zerbst*, 304 U.S. 458 (1938). The second was what "initiation" meant.

The Fourth Circuit correctly affirmed the District Court's thorough analysis (A. 1276-1278) of the disagreement following the *Edwards* opinion among members of this Court and among the lower courts concerning the first of these issues. *Bunch v. Thompson*, 949 F.2d 1354, 1360 (4th Cir. 1991). Justice Powell's concurrence in *Edwards* expressed uncertainty whether the majority's emphasis on "initiation" had created "a new *per se* rule, requiring a threshold inquiry as to precisely who opened

any conversation between an accused and state officials." 451 U.S. at 489-490.[1]

The Court's opinion the following year in *Wyrick v. Fields*, 459 U.S. 42 (1982), only increased the confusion about whether *Edwards* established a *per se* rule. In *Wyrick*, this Court reversed the Eighth Circuit for failing to "examine the 'totality of the circumstances,' as *Edwards* requires," 459 U.S. at 47, and concluded that the Eighth Circuit must have been "encouraged by what *it regarded as a per se rule* established in *Edwards* . . . " 459 U.S. at 48 (emphasis added), and had "misconstrued this Court's recent decision in *Edwards v. Arizona*, and imposed a new and unjustified limit on police questioning of a suspect who voluntarily, knowingly, and intelligently waive[d] his right to have counsel present." 459 U.S. at 43 (citation omitted). The Supreme Court of Virginia relied heavily on *Wyrick* in its effort to interpret and apply *Edwards* in Bunch's case. 225 Va. at 432-433, 304 S.E.2d at 276.

Justice Powell's concurring opinion in *Oregon v. Bradshaw*, 469 U.S. 1039 (1983), decided six days after Bunch's direct appeal was rejected, highlighted the uncertainties about *Edwards*, and compared seven lower court decisions interpreting *Edwards* as establishing a *per se* rule with five lower court decisions to the contrary. 462 U.S.

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[1] *Estelle v. Smith*, 451 U.S. 454 (1981), issued the same day as *Edwards*, added to the confusion surrounding *Edwards*. In *Estelle*, the Court quoted the *Edwards* opinion as holding that waivers of the assistance of counsel must meet the "*Johnson v. Zerbst* standard," and that the determination of waiver depended "upon the particular facts and circumstances surrounding [each] case. . . . " *Estelle*, 451 U.S. at 471 n. 16, *quoting Edwards*, 451 U.S. at 482.

1047, n.1. Moreover, while eight Justices agreed in *Bradshaw* that re-initiation by the suspect was required in an *Edwards* situation before the *Johnson v. Zerbst* test need be applied, Justice Marshall and the three Justices who joined his dissent disagreed with then-Justice Rehnquist and the three Justices who joined him over the meaning of "initiation." *Bradshaw*, 462 U.S. at 1048.

As the Court of Appeals concluded, the question of whether *Edwards* had established a *per se* rule was not definitively resolved in the affirmative, so that no lower court could reasonably hold to the contrary, until *Solem v. Stumes*, 465 U.S. 638, was decided in 1984. Prior to *Solem*, this Court had never referred to the *Edwards* decision as establishing a "bright-line rule." The only previous Supreme Court references to *Edwards* as a "*per se* rule" were in Justice Powell's *Bradshaw* concurrence expressing uncertainty whether *Edwards* was a *per se* rule, 462 U.S. at 1047, and the *per curiam* opinion in *Wyrick* reversing the Eighth Circuit for failing to "examine the 'totality of the circumstances,' as *Edwards* requires," 459 U.S. at 47, and concluding that the Eighth Circuit must have been "encouraged by what *it regarded as a per se rule* established in *Edwards*. . . . " 459 U.S. at 48 (emphasis added).

Solem was the first Supreme Court case to clarify that, while "*Edwards* did not overrule any prior decision or transform standard practice," 465 U.S. at 647, it did call for a "*per se* approach" to post-counsel request waivers of a qualitatively different sort than the previously-applied *Zerbst* analysis. *Id.* The *per se* rule of *Edwards* thus cannot be applied retroactively to cases where convictions became final before the *Solem* ruling.

Bunch's conviction became final when this Court denied certiorari in 1983. The Supreme Court of Virginia had never before addressed the question of whether *Edwards* had adopted a *per se* rule. That court held that it had not, as did many other lower courts at that time. The Virginia Court regarded the question of who re-initiated the communications leading to Bunch's confession as merely one of a number of factors to be weighed in the traditional "totality of the circumstances" analysis. This holding was consistent with all existing Virginia precedent and with all of this Court's pre-*Edwards* cases, and was a reasonable interpretation of *Edwards* at the time, especially in light of *Wyrick*.

The second major uncertainty about the *Edwards* opinion, the meaning of "initiation," is an issue of many facets, most of which are *still* unresolved by controlling precedent. The Court of Appeals recognized this uncertainty, 949 F.2d at 1360, and emphasized that the Virginia court was ruling "on a close question of law at the margins of the *Miranda* Doctrine," and that its ruling warranted respect in federal habeas review as one that reasonable jurists could make. 949 F.2d at 1362.

In this case, Bunch made an equivocal remark to the effect that he "might want to talk to a lawyer." His statements to the police which were admitted in evidence were made several days later, after he had in fact talked to and been advised by a lawyer, following which interview Investigator Cahill had asked Bunch "if he felt he was ready to sit down and go over the case."

The rules advocated by Bunch are that Cahill's question under these particular facts was permissible neither

as an attempt to clarify Bunch's ambiguous remark nor as an inquiry about whether Bunch had satisfied his desire for legal advice by consulting with Major Jillisky and had thus changed his mind about speaking to the police without an attorney. Unless both of these results were dictated by controlling precedent at the time Bunch's conviction became final, the rule he seeks to establish is a new one under *Teague*, and cannot be applied in his case. Otherwise, the application of *Edwards* to Bunch's case would be one occurring "in a novel setting, thereby extending the precedent." *Stringer v. Black*, 112 S.Ct. 1130, 1135 (1992).

Neither rule is dictated by controlling precedent today, much less in 1983 when Bunch's conviction became final. The permissibility of police questioning in an attempt to clarify a suspect's ambiguous remark about obtaining the advice of counsel was expressly left open by this Court in *Connecticut v. Barrett*, 479 U.S. 523, 529 n.3 (1987), and in *Smith v. Illinois*, 469 U.S. 91, 96 n.3 (1984) (per curiam). The question remains one as to which judicial minds differ considerably nationwide. *Compare, e.g., United States ex rel Espinoza v. Fairman*, 813 F.2d 117, 124 (7th Cir. 1987); *Maglio v. Jago*, 580 F.2d 202, 205 (6th Cir. 1978) (both holding that all questioning must cease upon an equivocal invocation of the right to counsel) with *People v. Evans*, 530 N.E.2d 1360, 1371 (Ill. 1988); *Cox v. State*, 493 N.E.2d 151, 155 (Ind. 1986); *State v. Johnson*, 318 N.W.2d 417, 430 (Io. 1982); *Castillo v. State*, 742 S.W.2d 1, 3 (Tex.Cr.App. 1987); *Eaton v. Commonwealth*, 240 Va. 236, 397 S.E.2d 385 (1990), *cert. denied*, 112 S.Ct. 88 (1991) (all holding that police interrogation may continue unless suspect invokes his right to counsel with a requisite degree of clarity); and with *Towne v. Dugger*, 899 F.2d

1104, 1110 (11th Cir. 1990); *United States v. Gotay*, 844 F.2d 971, 975 (2nd Cir. 1988); *Grooms v. Keeney*, 826 F.2d 883 (9th Cir. 1987); *United States v. Porter*, 776 F.2d 370 (1st Cir. 1985); *Nash v. Estelle*, 597 F.2d 513 (5th Cir. 1979) (en banc); *United States v. Riggs*, 537 F.2d 1219, 122 (4th Cir. 1976); *Day v. State*, 816 S.W.2d 852 (Ark. 1991); *State v. Anderson*, 553 A.2d 589, 593 (Conn. 1989); *Owen v. State*, 560 So.2d 207 (Fla. 1990); *State v. Robinson*, 427 N.W.2d 217, 223 (Minn. 1988); *Holland v. State*, 587 So.2d 848 (Miss. 1991); *State v. Sundstrom*, 552 A.2d 81, 84 (N.H. 1988) (all holding that police questioning after equivocal invocation of the right to counsel must be confined to clarification of the suspect's desires concerning counsel).

Likewise, Bunch's proposition that the police may not inquire of a suspect whether he has changed his mind about speaking to them without an attorney is not dictated by controlling case law even today, much less in 1983. Justice Powell's concurring opinion in *Edwards* indicated that such inquiries were permissible under the *Edwards* rule. 451 U.S. at 490. The respondent is unaware of any subsequent authority to the contrary. Such authority as exists supports or cites with approval Justice Powell's view. *See Moulds v. State*, 429 So.2d 1176, 1779 (Ala.Cr.App. 1983); *McCall v. State*, 501 So.2d 496, 500 (Ala.Cr.App. 1986); *State v. Acquin*, 448 A.2d 163, 177 (Conn. 1982); *King v. State*, 436 So.2d 50, 54 (Fla. 1983); *Johnson v. State*, 303 So.2d 7 (Ga. 1983); *State v. Scott*, 626 S.W.2d 25 (Tenn. Cr. App. 1981); *Foster v. Commonwealth*, 8 Va. App. 167, 380 S.E.2d 12 (1989). The panel opinion discussed several of these decisions at length to demonstrate the reasonableness of the Virginia court's decision. 949 F.2d at 1360-1361.

In *Minnick v. Mississippi*, 111 S.Ct. 486 (1990), this Court held that "when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." 111 S.Ct. at 491. This is clearly a new rule, and inapplicable to Bunch's case. The very necessity, perceived by this Court, of rendering a full opinion in *Minnick* rather than summarily reversing in light of *Edwards*, is an indication that the question of whether mere consultation with counsel would satisfy *Edwards* and permit reinitiation of interrogation by the police had not previously been resolved beyond susceptibility to debate among reasonable minds:

> *Whatever the ambiguities of our earlier cases on this point*, we now hold that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney.

111 S.Ct. at 491 (emphasis added).

Thus, even if the interpretation of *Edwards* as establishing a bright-line rule that the suspect must initiate further interrogation were applicable to Bunch's case, a rule that Cahill's question was an impermissible initiation of interrogation would clearly be new, and could not be applied.

II. THE FEDERAL COURTS SHOULD NOT CONSIDER APPLICATION OF THE EXCLUSIONARY RULE FOR *EDWARDS* OR *MIRANDA* VIOLATIONS ON COLLATERAL REVIEW OF STATE CRIMINAL CONVICTIONS.

This Court recently agreed to decide whether *Stone v. Powell*, 428 U.S. 465 (1976), should be extended to federal habeas cases involving claims of *Miranda* and Fifth Amendment violations. *Witherow v. Williams*, 112 S.Ct. ___, 51 Cr.L. 3021, No. 91-103 (April 20, 1992). The respondent submits that it should. In *Stone v. Powell*, 428 U.S. 465 (1976), this Court held that federal courts would no longer apply the exclusionary rule for Fourth Amendment violations in collateral review of state criminal convictions, because the well-recognized societal costs of such applications of the rule far outweighed any marginal benefit obtained. In *Duckworth v. Eagan*, 492 U.S. 195 (1989), Justices O'Connor and Scalia indicated in their concurring opinion they believed that *Miranda* violations, like Fourth Amendment violations, should not give rise to application of the exclusionary rule on collateral federal review of state criminal convictions. The Court had raised that question *sua sponte*, but declined to resolve it, in *Wainwright v. Sykes*, 433 U.S. 72, 87 n.11 (1977). Thus, even if Bunch's interpretation of *Edwards* were applicable to his case, this Court should decline to consider Bunch's *Edwards* claim upon the authority of *Stone v. Powell*.[2]

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[2] The Court of Appeals expressly declined to address this question, having rested its decision on narrower grounds. 949 F.2d at 1363, n. 2. The argument is presented here as additional support for the result reached by the Court of Appeals.

The *Edwards* rule, like the *Miranda* rule, "is not, nor did it ever claim to be, a dictate of the Fifth Amendment itself. . . . Like all prophylactic rules, the [*Edwards*] rule 'over protects' the value at stake. In the name of efficient judicial administration of the Fifth Amendment guarantee and the need to create institutional respect for Fifth Amendment values, it sacrifices society's interest in uncovering evidence of crime and punishing those who violate its laws." *Duckworth*, 492 U.S. at 209 (O'Connor, J., concurring). Like evidence seized in violation of the Fourth Amendment, evidence seized through *Miranda* or *Edwards* violations, especially violations as technical as those which Bunch alleges, "can in no way have been rendered untrustworthy by the means of its seizure and indeed often this evidence alone establishes beyond virtually any shadow of a doubt that the defendant is guilty." *Stone v. Powell*, 428 U.S. at 489; *quoting Kaufmann v. United States*, 394 U.S. 217, 237 (1969) (Black, J., dissenting).

As in the Fourth Amendment context, the application of the exclusionary rule in federal habeas corpus to enforce the *Edwards* or *Miranda* rules:

> results in serious intrusions on values important to our system of government. They include "(i) the most effective utilization of limited judicial resources, (ii) the necessity of finality of criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded."

Stone v. Powell, 428 U.S. at 491 n.31, (*quoting Schneckloth v. Bustamonte*, 412 U.S. 218, 259 (1973) (Powell, J., concurring). "While this balance of interest may be perfectly justified in the context of direct review of criminal convictions, . . . the balance shifts when applied to a presumptively final criminal judgment which is collaterally attacked in a federal habeas corpus proceeding." *Duckworth*, 492 U.S. at 209-210 (O'Connor, J., concurring). The application of the exclusionary rule in federal habeas corpus proceedings to whatever *Miranda* or *Edwards* violations are not discovered upon trial, direct review in the state courts, or certiorari review in this Court is of negligible additional deterrent effect in convincing state law enforcement authorities to abide by the *Edwards* and *Miranda* decisions. This is more true today than it was when *Stone v. Powell* was decided in 1976, because of the diminished role which federal habeas corpus review plays in reviewing state criminal convictions in light of the new rule doctrine of *Teague*.

> Excluding probative evidence years after trial, when a new trial may be a practical impossibility, will often result in the release of an admittedly guilty individual who may pose a continuing threat to society. While federal courts must and do vindicate constitutional values outside the truth seeking function of a criminal trial, where those values are unlikely to be served by the suppression remedy, the result is positively perverse. Exclusion in such a situation teaches not respect for the law, but casts the criminal system as a game, and sends the message that society is so unmoved by the violation of its own laws that it is willing to frustrate their enforcement for the smallest of returns.

Duckworth, 492 U.S. at 211-212 (O'Connor, J., concurring).

III. INVESTIGATOR CAHILL DID NOT IMPERMISSIBLY INITIATE INTERROGATION OF BUNCH.

Bunch's argument that Cahill impermissibly initiated interrogation of him is not only a new rule and thus inapplicable under *Teague*, it is meritless as well.

Edwards "was in effect a prophylactic rule, designed to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in *Edwards* was." *Oregon v. Bradshaw*, 462 U.S. at 1044. Edwards, after having given an exculpatory statement in custodial interrogation, offered to "make a deal," but stated that he wanted an attorney before making a deal. Interrogation ceased at that point, but the next morning, when the police came to the jail to question Edwards further, the jailer told him that "he had to" talk to them even though he did not want to. He was taken into their presence and interrogated, and eventually he confessed. 451 U.S. at 479.

As Justice Powell stated in his concurring opinion, "few cases will be as clear as this one." 451 U.S. at 490. At least one lower court has held that interpretation of the *Edwards* prophylactic rule should not be "divorced from the context of badgering police conduct from which the rule sprang," *Plazinich v. Lynaugh*, 843 F.2d 836, 839 (5th Cir. 1988), and that "in the absence of some police interference with the exercise of the right to counsel of the accused, the *Edwards* rule is to be strictly and narrowly applied." *Griffin v. Lynaugh*, 823 F.2d 856, 862 (5th Cir. 1987). *Accord, United States v. Duggan*, 936 F.2d 181, 183 (5th Cir. 1991).

When Investigator Cahill asked Bunch "if he felt he was ready to sit down and go over the case" (A. 107), he was merely trying to determine whether or not Bunch felt that his need for legal advice had been satisfied by his conference with Major Jillisky, the military lawyer at Quantico, and was then willing to discuss the case without further legal assistance. This conclusion is supported by the Supreme Court of Virginia's finding that Cahill's question "amounted to nothing more than an effort to ascertain if Bunch had changed his mind about wanting an attorney," 225 Va. at 435, 304 S.E.2d at 277, which is presumed correct in this Court under 28 U.S.C. § 2254(d), and by Cahill's own testimony that he posed this question to Bunch because he knew Bunch had just talked to a lawyer. (A. 108).

Contrary to Bunch's argument, the trial court's expression of the opinion that the Jillisky interview had not satisfied Bunch's right to counsel has no bearing on the purpose or interpretation of Cahill's question. The question of whether the Jillisky interview satisfied Bunch's need for legal advice was for Bunch to decide, not the trial court. *Edwards* focuses on the *defendant's* state of mind. *Arizona v. Roberson*, 486 U.S. 675 (1988). Bunch in fact did feel that his need for legal advice had been fulfilled. Bunch said "he had talked with the lawyer at Quantico, and . . . he wanted to get it off his chest . . . " (A. 86), and that, in spite of the lawyer's advice that he should talk to a civilian lawyer before he talked to the police, Bunch had "decided that he was ready to tell the

whole story. . . . " (A. 107).[3] The trial court found that Bunch's reaction to the military lawyer's advice that he should remain silent and seek civilian counsel was to conclude that everything was futile. (A. 132).

Inquiries comparable to Cahill's, made under analogous circumstances, have been recognized as permissible. As Justice Powell observed in his *Edwards* concurrence,

> Communications between police and a suspect in custody are commonplace. It is useful to contrast the circumstances of this case with typical, and permissible, custodial communications between police and a suspect who has asked for counsel. For example . . . the police legitimately may inquire whether a suspect has changed his mind about speaking to them without an attorney.

451 U.S. at 490.

Likewise, police may continue to question a suspect in custody in order to clarify the meaning of the suspect's equivocal comment concerning obtaining legal counsel. *Grooms v. Keeney*, 826 F.2d 883, 886 (9th Cir. 1987); *United States v. Cherry*, 783 F.2d 1124, 1130 (5th Cir. 1984). Cahill and Hamblen testified (A. 71-72, 92), and Bunch agreed (A. 37-38), that Bunch had said that he "might want to talk to a lawyer." The Supreme Court of Virginia found as a fact that Bunch's statement was ambiguous. 225 Va. at

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[3] These responses by Bunch, expressing his willingness to talk without counsel but not containing inculpatory information, belie his argument in the Court of Appeals that "Bunch perceived Cahill's question as a broad request for information concerning the crime. . . . " (Pet. Rhg. at 15).

443, 304 S.E.2d at 276.[4] This finding must be presumed correct under 28 U.S.C. § 2254(d). *Sumner v. Mata*, 449 U.S. 539, 545-547 (1981); *Cabana v. Bullock*, 474 U.S. 376, 388 n.5 (1986).

In addition, this Court has made it clear that a suspect's invocation of the right to counsel can be a limited one, and that police may continue the interrogation without providing counsel as long as they confine the subsequent interrogation within the limits specified by his invocation of the right to counsel. *Connecticut v. Barrett*, 479 U.S. at 529. A necessary corollary to this rule is that, when the police are uncertain as to the limitations the suspect has placed upon the interrogation which he is willing to undergo without the assistance of counsel, they may inquire of him as to such limitations. *See Griffin v.*

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[4] Because a finding concerning the meaning of a suspect's remarks about his right to counsel is a finding of historical fact, *see United States v. Wyatt*, 561 F.2d 1388, 1390 (4th Cir. 1977); *United States v. Riggs*, 537 F.2d 1219, 1222 (4th Cir. 1976), a finding concerning the apparent meaning, or lack thereof, of his remark to the interrogating officers should also be regarded as a finding of historical fact. To the extent that the trial court's conclusions that "somewhere along the interview [Bunch] indicated the feeling that he should have an attorney present," and that "Hamblen excused himself from [the interrogation] because there was some indication that an attorney was desired or felt like it should be present" (A. 118), were inconsistent with the Supreme Court of Virginia's finding that Bunch's remark that he might want to talk to a lawyer was ambiguous, these findings by the trial court were implicitly rejected by the Supreme Court of Virginia. The State Supreme Court's resolution of these factual issues, and of the meaning of the trial court's remarks, is entitled to deference in federal habeas review. *See Wainwright v. Goode*, 464 U.S. 78 (1983).

Lynaugh, 823 F.2d at 863-864. Since Bunch's remark to Cahill had been that he "might want to talk to a lawyer," and since he had in fact talked to and been advised by a lawyer at Quantico, it was eminently reasonable and permissible for Cahill thereafter to inquire whether Bunch was then prepared to discuss the facts of the case.

Minnick v. Mississippi, if it were applicable to Bunch's case, would not require a contrary result on the merits. After having consulted with an attorney, Minnick, like Edwards, was told that "he would have to talk to [the deputy sheriff] and that he could not refuse." 111 S.Ct. at 488-89 (internal quotations omitted). Thus, *Minnick* does not resolve the question of whether the police may simply inquire whether a suspect has changed his mind about speaking to them without counsel.

CONCLUSION

Certiorari is not warranted to review the Court of Appeals' simple and correct finding that the relief which Bunch seeks based on *Edwards v. Arizona* would violate the new rule doctrine. Even if that were not the case, however, certiorari would still be unwarranted because *Miranda* and *Edwards* claims should not normally be reviewed in federal habeas corpus proceedings, and because the Supreme Court of Virginia correctly found

that Investigator Cahill did not impermissibly initiate interrogation of Bunch.

Respectfully submitted,

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